Supreme Court, U. S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 75-41

YELLOW FREIGHT SYSTEM, INC.,
Petitioner,

and

LOCAL UNION NO. 823, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

vs.

BILLY G. BUTLER,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals for the Eighth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals for the Eighth Circuit**

Petitioner, Local 823, Teamsters, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit finding that the Union had breached its statutory duty of fair representation toward Butler and assessing compensatory damages of $6,500 for such breach. The Court of Appeals affirmed the judgment of the District Court in each respect.

## OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported, but the relevant portions thereof are printed in Appendix A, attached hereto. The opinion of the District Court on petitioner's motions after verdict is reported at 374 F. Supp. 747 (W.D. Mo. 1974) and is set forth in relevant portion in Appendix B, attached hereto.

## STATEMENT OF JURISDICTION

On April 9, 1975, the Court of Appeals denied petitions for rehearing en banc filed by both Local 823 and Yellow Freight System. [See petition for certiorari of Yellow Freight System, Inc., Appendix C, A.26.] The Court's initial opinion was entered on March 18, 1975. The jurisdiction of this Court is invoked under 28 USC 1254(1).

## QUESTIONS PRESENTED

Whether, as a matter of law, the Local Union leadership did not breach their duty of fair representation when they resolved a conflict over scarce job opportunities following the merger of two trucking firms, by advocating (before an adjudication tribunal) the right of the more numerous previously employed workers of the acquiring Company to have preference over the less numerous transferred workers of the acquired Company in the choice of runs leaving a terminal of the acquiring Company?



## STATUTORY PROVISION INVOLVED

Labor-Management Relations Act § 301 (29 USC § 185):

**Suits by and against labor organizations—Venue, amount and citizenship**

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

**Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments**

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter, and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

**Jurisdiction**

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or

(2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

**Service of process**

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

**Determination of question of agency**

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. June 23, 1947, c. 120, Title III, § 301 61 Stat. 156.

## STATEMENT OF THE CASE

Billy Butler and Local 823 were participants in a zero-sum game. To the extent that Butler "won" the right to first pick of the more remunerative trucking runs leaving the Yellow Freight System, Inc. terminal at Baxter Springs, Kansas, to that extent another truck driver, a Local 823 member, employed by Yellow Freight System at the same location, "lost" access to relatively greater income opportunities. The jury, the District Court, and the Court of Appeals found that the leadership of the Local Union had breached their duty of fair representation because they chose to support the claims of the truck drivers who had been employed by Yellow Freight at Baxter Springs for a longer period than Butler. In short, the Local chose to advocate the wrong principle for allocating a scarce



resource upon which more claims were made than could be satisfied, or so the decision-makers below would have it.

In March of 1965, Yellow Freight received temporary authority from the Interstate Commerce Commission to acquire and manage Watson-Wilson Transportation Company.[1] Permanent authority to acquire Watson-Wilson through purchase of stock and physical capital was granted by the ICC in May or June of 1966.[2] Temporary authorization to "merge" operating authority was sought in October of 1966.[3] Permanent merger of operating authority came on December 9, 1968.[4]

From March of 1965, Yellow Freight effectively managed Watson-Wilson and in a functional economic sense, integrated that firm into the operations of Yellow Freight.[5] Yellow Freight reordered the flow of transportation service throughout both systems with a view toward increasing the efficiency and profitability of the integrated operation.[6] As a result, certain "old" terminals of Watson-Wilson were closed or experienced a reduction in demand and some 350-400 Watson-Wilson drivers found themselves out of work.[7]

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[1] R117-120, 376. [All page references are to the trial transcript.] Watson-Wilson although technically "solvent" (in that sense that it was not facing bankruptcy or receivership) was on hard times. Many workers, including Butler, were on layoff, before the merger process began. 394, 504, 466.

[2] R376, 611, 948-950.

[3] R120, 376, 612.

[4] R120, 376, 377.

[5] R376, 377, 466-468.

[6] R394-395, 402, 406-410, 455-459, 504.

[7] R394-395, 402, 406-410, 455-459, 504.

What was to be done with these workers, all of them members of the Teamsters International Union, albeit being members of different Locals within the International?[8]

Pursuant to Sec. 3, para. (8) of Article 5 of the relevant labor contract,[9] the affected local unions and the trucking companies presented the matter of the drivers job failures to the Change of Operations Committee, a decision-making body created by the contract whose job it was "to add to or to modify these rules [seniority principles] in specific situations presented to it" when, *inter alia*, a merger of solvent companies created a demand for work opportunities in excess of the supply of relatively higher paid jobs.[10]

On June 16, 1965, the Change of Operations Committee decided that all Watson-Wilson workers "displaced" by the merger within certain geographical areas "shall be placed on a master seniority [list] with the original date of hire, regardless of the terminals they may have worked in where they accumulated only terminal seniority . . ."[11]

The Committee also extended the period of time in which these people could exercise their seniority rights, whatever they might be, to 5 years from 2 years from date of layoff.[12]

In the text of the decision, the Committee said nothing about the uses to which this master seniority list would be put, assum-

[8] R400, 404-405, 402. See Appendix D, App. p. A-11, the Change of Operations Committee decision.

[9] The 1964-1967 National Master Freight Agreement with Central States Area Over-the-Road Supplement. Appendix E, App. p. A-18.

[10] Article 5, Sec. 3, para. (8) of Appendix D, App. p. A-11.

[11] See para. 1, Appendix C, App. p. A-10; R395-402.

[12] See para. 3, Appendix C, App. p. A-10.



ing that the displaced drivers got jobs at other terminals of the integrated system where work might be available. Local 823 made its position clear before the Committee in June of 1965: Any displaced worker who was allocated to any terminal in its jurisdiction was to have "terminal seniority" for the purpose of bidding runs—a position the local consistently maintained at all relevant times.[13]

Yellow Freight proceeded to implement the Committee decision, as it saw its terms. The Company determined where additional workers were then needed within the integrated systems.[14] Then it sent the displaced workers a letter, or "bid sheet" the worker was the most senior bidder for an opening, he got the job.[16] The driver was given credit for time worked for Watson-Wilson, for the purpose of bidding runs at the Yellow terminals, but if and only if he had sufficient relative seniority at Watson-Wilson to have successfully bid into a Yellow terminal during the first round of bidding commenced in June of 1965.[17] Thereafter, the worker could be allocated to jobs at terminals as de-

[13] R120-122, 158-159, 162, 171-172, 182-184, 252, 253, 278, 279, 378, 379, 380, 652-653, 662, 665-667, 670, 678, 701-702, 704, 711-712, 715, 716, 717.

[14] R394-395, 406-410, 455-459, 504.

asking them to order their preferences for available work.[15] If

[15] R406-410, 436-437. See also Appendix F and G, App. pp. A-26, A-28.

[16] R410, 411, 416-417, 426-431, 436-437.

[17] R410-411, 416, 426-428, 431, 436-437, 458, 462-463. Yellow added one caveat: If in the first round a worker bid into a location which did not generate sufficient work to keep him employed, or employed at a level of expected income, he could, within 60 days of the original bid, take a "layoff" at the bid location, and transfer into some other terminal where work was available, and he was more senior than any other bidder. He would be employed at the second terminal with a credit for all time worked at Watson-Wilson for all purposes, including bidding runs. R306-316, 319-324, 325-331, 472-473, 38-39, 41-46, 58-60.

mand for labor increased and he was the most senior bidder. However, for the purpose of bidding runs out of the terminals, he would have terminal seniority only. That is to say, he would have to rely upon his date of hire at the Yellow terminal unaugmented by a credit for work performed at Watson-Wilson.[18] He could, however, utilize the Watson-Wilson credit for computing the length of his paid vacation and the value of his pension claims.[19]

Local 823 continued its opposition to permitting displaced Watson-Wilson drivers to use their seniority with that firm for the purpose of bidding on freight runs now originating from the Yellow Freight terminal in Baxter Springs.[20]

During the period from June 1965 to January 1966, 17 Watson-Wilson drivers bid into openings at the Yellow Freight terminal in Baxter Springs either in the first round of bidding in June, or within 60 days of an initial bid into another location which then did not provide sufficient work.[21]

Local 823 (while not objecting to a credit for time worked at Watson-Wilson for the purpose of computing fringe benefits) did oppose such credit for the purpose of bidding runs.[22] At the Yellow Freight terminal in Baxter Springs, as at all locations covered by the Central States Area Over-the-Road supplement to the National Master Freight Agreement, the

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[18] R410-411, 416-417, 426-431, 436-437, 446-447, 458, 462-463.

[19] R410-411, 416-417, 426-431, 436-437, 446-447, 458, 462-463.

[20] R652-653, 715, 716-717.

[21] R38-39, 41-46, 58-59, 446-448. These drivers constituted about 10% of total driving force at Baxter Springs as of December 16, 1966. 17.193—See Plaintiff's Exhibit 38.

[22] R652-653, 716-717.



income of a regular truck driver is directly proportioned to miles traveled, and weight of the commodity transported.[23]

Accordingly, the labor contract provides that all runs and new positions are subject to seniority and shall be posted for bids.[24]

As Local 823 saw the matter, first choice on the longest, heaviest runs originating from the Yellow terminal, should go to those workers who had been employed by Yellow at that terminal for the longest period of time simply because the highest income earning opportunities within the Yellow Freight system should be available to those who had worked longest for Yellow.[25]

At first, there was little need to choose a principle for allocating the scarce resource. Because the operating authority of each firm had not been temporarily or finally merged with ICC approval (nor had Yellow been given permanent authority to even acquire the stock and physical capital of Watson-Wilson) the Watson-Wilson drivers took runs only on Watson-Wilson operating authority which did not parallel the authority of Yellow Freight System.[26] Yellow Freight drivers worked

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[23] R158-159, 161, 208-215, 261-262, 557-559, 561-562, 576-577, 579-580.

[24] Appendix D and E, Article 41, Sec. 2, App. pp. A-17, A-25.

[25] R158-159, 208-215, 261-262, 653, 715, 716-717.

[26] The transferred Watson-Wilson drivers made runs through Amarillo, Texas to destinations West and Southwest of Amarillo, all within Watson-Wilson's operating authority. They would not shuttle between Amarillo and Baxter Springs because the Company authority permitted movement to Amarillo only as part of a longer journey to a destination West and Southwest of that City. R65, 67, 432-438, 468, 496-497, 653-657.

the runs on Yellow's authority.[27] Although all drivers worked out of the same terminal, functionally, they were operating as if no integration of the firms had occurred. There were separate seniority lists for allocation of work within each separate operating authority.[28]

But in the Fall of 1966, the 17 Watson-Wilson drivers who bid into the Baxter Springs Yellow terminal pressed for the right to bid on all runs, using their Watson-Wilson service credit for this purpose.[29]

Local 823 maintained its position that the best work opportunities at the terminal should be offered to the people longest employed by Yellow Freight at that work location.[30]

After some of the Watson-Wilson drivers filed charges with the NLRB and grievances under the labor contract, the Change of Operations Committee convened in Chicago and concluded that all 17 drivers were entitled to bid all runs from Baxter Springs on the basis of the Watson-Wilson service seniority credit.[31]

Even then, Local 823 continued to resist a seniority credit for those Watson-Wilson drivers who had originally bid into a terminal other than Baxter Springs, but had been subsequently transferred to that location within sixty days of their arrival at

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[27] R432-438, 468, 496-497, 653-657, Yellow drivers would shuttle between Amarillo and Baxter Springs. But Yellow's authority did not permit movement west of Amarillo.

[28] R468, 496-497, 653-657.

[29] R125-127, 130-137, 151, 154, 324-325, 347-359, 446-447.

[30] R120-122, 158-159, 162, 171-172, 182-184, 252-253, 278-279, 378-380, 652-653, 662, 665-667, 670, 678, 701-704, 711-717.

[31] R125-127, 130-137, 151, 154, 324-325, 347-359, 446-448, 466-467, 474, 475-477, 502, 508-510.



the terminal of their first choice because there wasn't enough work for them at their preferred work site.[32] Local 823, grudgingly "went along" when Williams, a Teamsters official who was a member of Change of Operations Committee, informed Kitts, an official of Local 823, that indeed, the Committee intended to give all Watson-Wilson drivers working in the integrated system as of September 1966, full credit for the time worked at Watson-Wilson, when they bid on runs flowing out of the Yellow Freight terminal in Baxter Springs.[33]

Butler arrived in Baxter Springs in March of 1967 after Yellow apprised him that work was available.[34] Not surprisingly, officials of Local 823 informed him that although he would get a credit for his prior service with Watson-Wilson for the purpose of computing his vacation, he would have to rely on his seniority at Baxter Springs for the purpose of bidding runs.[35] The Union was determined that those peope who had put in the most time for Yellow Freight at that terminal would get first "dibs" on the relatively richer runs. At first Butler accepted these terms of employment.[36] Then he got to talking to the former Watson-Wilson drivers.[37]

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[32] R701-702, 704, 706, 711-712.

[33] R701-706, 711-712, 935.

[34] R120, 121, 122, 158-159, 162, 183-184, 252, 253, 278, 279, 381-382, 665-666. Yellow Freight concurred in this judgment. R162-165.

[35] R107-109, 432.

[36] R221-222, 252, 664-665. As Butler acknowledged, his local union at the terminal at which he worked when employed by Watson-Wilson had told him that the "master seniority list" created by the Change of Operations Committee decision of June 16, 1965 was to be used simply for the purpose of obtaining employment at Yellow Freight terminals should work become available. Yellow had to pick persons from the list before going to the general labor market pool. R223-226, 263, 267, 271. Butler, on his arrival, had no expectation of a seniority credit for bidding runs at Baxter Springs.

[37] R268.

When he discovered that all of his former colleagues at Watson-Wilson had received a seniority credit for all purposes at the Yellow terminal, he wanted the same treatment.[38]

Kitts, a Local Union officer, explained to him that because he had not bid into Baxter Springs during the first round of bidding in June of 1965, he was not entitled to a seniority credit for the purpose of bidding on runs at the Baxter Springs terminal.[39] Webb, another Union official, expressed the same view, and "guaranteed" Butler that he would lose any grievance he submitted to the Joint Area Committee for consideration.[40]

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[38] R673-674.

[39] R283-284, 377-379, 381-382, 670. At trial there was a dispute as to whether Butler had indicated a preference for Baxter Springs as of June 30, 1965. R84, 90, 226-227, 260, 283-285, 520-556. See Appendix F, App. p. A-26. There was no dispute that he had inlicated such a preference as of August 5, 1965. See Appendix G, App. p. A-28. But this dispute is not relevant to an evaluation of the Union's performance of its duty to fairly represent Butler. There is no dispute that under no circumstances did Butler have sufficient relative seniority at Watson-Wilson to bid into openings at Baxter Springs even assuming he expressed his preference as of June 30, 1965. More senior drivers at Watson-Wilson filled all the openings at Baxter Springs during the first round of bids. R375, 378-379, 381-382. R429-431, 458. At all times, Local 823 took the position that anyone who was not on the Yellow payroll as of the first round of bidding in June of 1965, including those who transferred when their first bids aborted, was not entitled to a "Company" seniority credit for bidding runs, 377-379, 381-382. If that stance does not violate the duty, there is no liability even if Butler did bid Baxter as of June 30, 1965, given the fact that such bid would not have been successful because of his relative seniority. [R375, 378-379, 381-382, 429-431, 458.] On the other hand, if such position does violate the duty, there is a liability even if Butler declined Baxter Springs in June of 1965. He was on the payroll as of March 1967, the first time he could possibly have been hired as all parties agree and the Court of Appeals found. See fn. 13, Appendix A, App. p. A-1. The issue is how should the Union have treated his claim for a Watson-Wilson earned seniority credit at that time. That issue remains. However, the jury resolved the question of when he initially expressed a preference for Baxter Springs —June or August 1965.

[40] R162.



Butler persisted. In August of 1967, Kitts presented his claim to the Kansas-Missouri Area Grievance Committee, composed of an equal number of management and union representatives, including Mr. Webb, an officer of Local 823.[41] The Area Committee concluded that Yellow Freight's decision to grant Butler a seniority credit for fringe benefits only "comply[ied] with the change of operations decision."[42]

As the Court of Appeals concluded, the jury could properly decide that although Kitts formally presented Butler's claim for a seniority credit, the Local, through Kitts and Webb, effectively took the position before the Area Committee that since Butler was not employed at Baxter Springs at the end of the first round of bidding in 1965, or at the time of the second operations committee decision in the Fall of 1966, he was not entitled to a seniority credit in March of 1967.[43] This failure of advocacy violated the Union's duty of fair representation because the Union officers were motivated by a desire to satisfy the needs of the more numerous Yellow Freight drivers who had been previously employed at Baxter Springs, and who had let it be known in no uncertain terms that they did not want their income opportunities diminished because of "outsiders" from Watson-Wilson.[44]

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[41] R419-424, 426-427, 490, 491, 591, 594, 631, 632, 638-639, 641, 673-674, 717-718. Under both the 1964-67 and 1967-70 labor contracts, it was the function of the Area Grievance Committee to "mutually agree to such disposition of the seniority problems as in their judgment is appropriate under the circumstances" when the "parties acknowledge that specific situations may arise which may not be covered by the above rules [seniority allocation on merger of solvent firms] or in which the parties may feel that different treatment of the problem is necessary". Sec. 3(8) of Article 5 of the 1964-67 contract. Sec. 7 of Article 5 of the 1967-70 contract. See Appendix D, App. p. A-11; Appendix E, App. p. A-18.

[42] Defendant Yellow Freight Exhibit 50. R609.

[43] Appendix A, App. p. A-7, fn. 18.

[44] Appendix A, App. p. A-1, R653, 716-717.

But in light of what principles of statutory and decisional labor law can it be maintained that a Local Union violates the duty of fair representation when it seeks to vindicate the principle of terminal seniority for the allocation of bids run upon a merger of two firms before tribunals which by contract are to exercise "appropriate judgment" in "specific situations presented" to them?



## REASONS FOR GRANTING THE WRIT

### I. The Determination of the Court of Appeals That the Local Union Violated the Duty of Fair Representation (Simply Because It Affirmed the Interests of an Aggressive Majority of Workers as Against a Minority in a Situation Where Neither Class Could Be Fully Satisfied, and Neither Class Could Claim Reliance Upon Reasonable Expectations Predicated Upon the Labor Contract) Is Inconsistent With the Decisional Law of This Court Which Holds That Consistent With the Duty of Fair Representation, the Union, as a Political Institution, May Choose Between the Competing Claims of Its Constituency Provided Such Choice Serves the Needs of the Membership Considered in Aggregate and Such Choice Does Not Impose Burdens on Members Because of Their Race, Sex, or Internal Union Political Allegiances.

#### A. The Union as a political institution

This Court has recognized that the trade union serves as the workers' political tool for gaining a measure of control over their work lives. By relating to one another through the mechanism of the Union (thus controlling the supply of their services) people who exchange their labor for compensation can increase their bargaining power vis-a-vis those relatively fewer people who own and control the production processes in which workers labor.[45] These observations are the foundation of the

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[45] *Emporium Capwell Co. v. Community Organization*, 420 US 50, 61-65, 67-70 (1975); *Labor Board v. Weingarten, Inc.*, 420 US 251, 260-262, 265 fn. 10 (1975); *Labor Board v. Allis-Chalmers Mfg. Co.*, 388 US 175, 180-181 (1967); *American Shipbuilding v. Labor Board*, 380 US 300, 316 (1965).

Labor-Management Relations Act, which in turn is the basic source of labor policy within the labor law system.[46]

Like all other political persons, union leadership finds it impossible to satisfy the needs of all members of the constituency simply because of a scarcity of resources. If people claiming the highest paying jobs are more numerous than the jobs, as is the case here, someone must lose. This Court has consistently recognized that the Union may make hard choices provided that the principle of allocation serves the needs of the members in aggregate and in the long run and such choice does not represent the acting-out of racial or sexual preference, or reprisals against internal Union political enemies.[47] More specifically, the Court had held that unions may deviate from the principle of length-of-service seniority in allocation of limited job opportunities if such deviation serves the long-run needs of the class or affirms a value which has broad community support.[48]

Although there was no evidence that Butler, a white male with no previous contact with Local 823, was the object of "hostility" arising out of his personal traits, the Court of Appeals

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[46] See cases fn. 45, *supra*. *Boys Markets v. Retail Clerks Union*, 398 US 235, 242, 245-246 (1970); *AVCO v. Machinists*, 390 US 557. 559-560 (1968); *Vaca v. Sipes*, 386 US 171, 177, 185-188, 191-193 (1967).

[47] *Emporium Capwell Co. v. Community Organization*, 420 US 50, 62-65, 67-69, 70 (1975); *Vaca v. Sipes*, 386 US 171, 177, 182, 189-195 (1967); *Motor Coach Employees v. Lockridge*, 403 US 274, 299 (1971); *Labor Board v. Allis-Chalmers*, 388 US 175, 180-181 (1967); *Humphrey v. Moore*, 375 US 335, 346-350 (1964).

[48] *Ford Motor Co. v. Huffman*, 345 US 330, 334-335, 337-342 (1953), (preemployment seniority credit for military service); *Aeronautical Industrial District Lodge 727 v. Campbell*, 337 US 521, 523-524, 527-529 (1949), (seniority credit for union officers unrelated to length of service in the firm). See generally, *Humphrey v. Moore*, 375 US 335, 346-350 (1964).



concluded that the jury could reasonably find that the Union "gave in" to the angry pressures it was receiving from the Yellow Freight "old-timers" at Baxter Springs who wanted first opportunity to choose all runs flowing from that terminal and greatly outnumbered the Watson-Wilson drivers.[49] So be it.

But the logic of the decisional law does not fault a Union leader who when confronted with competition for limited job opportunities, who affirms the position of the majority of his members where such action does not reduce net benefits for the class of workers he represents; his action can strengthen the position of each member of the class, and the minority member or members cannot claim reliance upon a clear contract right.

### B. No Net Loss to Members of the Class Considered in the Aggregate

The position taken by Local 823 simply distributed money from the transferred Watson-Wilson drivers to the already domiciled Yellow drivers. No value was destroyed. The aggregate compensation for the class of all drivers at the Baxter Springs terminal remained the same. Had the Union urged that members of the class of transferred drivers forfeit their Watson-Wilson seniority for the purpose of computing their fringe benefits, the leadership would have been hard pressed to justify that decision which would have reduced that aggregate compensation for their total constituency. But Local 823, acting through Kitts and Webb, at all times maintained that Butler, and the other Watson-Wilson drivers should receive a seniority credit for the purpose of computing their vacation pay and other fringes.[50] Since the transaction was zero-sum, one group had to lose what the other gained, there is no principled basis on which the allocation could

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[49] Appendix A, App. p. A-1. R378-379, 652-662, 653, 715-717.

[50] R120-122, 158-159, 252-253, 278-279, 381-382, 665-666.

be made, and hence the Union could not be acting "arbitrarily" or irrationally, unless Butler and the other Watson-Wilson drivers had a reasonable expectation that pursuant to the contract they were entitled to a seniority credit for past service with the acquired firm. But the text of the contract indicates that such reliance would not be reasonable.

### C. Since the Text by the Labor Contract Does Not Unambiguously Confer a Right to a Seniority Credit for Work Previously Performed at Watson-Wilson for the Purpose of Bidding Runs at the Yellow Freight Terminal, Butler Cannot Claim That the Local's Advocacy of a Contrary Position Before the Area Committee Arbitrarily Deprived Him of a Reasonable Expectation Upon Which He Relied When He Came to Baxter Springs

We acknowledge that a trade union acts "arbitrarily" if it advocated a position before an adjudicatory tribunal created by the contract[51] which is detrimental to the interests of some of its members and is flatly contradicted by the language and logic of the written contract. Workers can rely upon their Union to affirm rights firmly secured by ratified contract.[52] But the Master

[51] The Kansas-Missouri Grievance Committee does adjudications which are entitled to the same deference given any other adjudication by a forum created by contract. R591-594, 631-632. *Humphrey v. Moore*, 375 US 335, 336, 338, 345-351 (1964); *General Drivers v. Riss & Co.*, 372 US 517, 517-520 (1963). See also, *Banyard v. Labor Board*, 505 F2d 342, 344-349 (D.C. Cir. 1974); *Steiman v. Spector Freight System, Inc.*, 441 F2d 599, 600-601, 604 fn. 8 (2d Cir. 1971); *Morris v. Werner-Continental, Inc.*, 466 F2d 1185, 1187-1191 (6th Cir. 1972); *Teamsters v. Braswell Motor Freight Lines*, 422 F2d 109, 112-115 (9th Cir. 1970); *Bieski v. Eastern Automobile Forwarding Company*, 396 F2d 32, 42 (3d Cir. 1968).

[52] Wellington, *Labor and the Legal Process*, 163-184 (1968); Lewis, *Fair Representation in Grievance Administration: Vaca v. Sipes*, 1967 Supreme Court Review 81, 107-126 (1967).



Freight Agreement with its Central States Supplement does not expressly provide for seniority credits for all purposes upon merger of solvent firms.

The Court of Appeals and the District Court ultimately concluded that as a matter of law, Butler and the other Watson-Wilson drivers had a right to be "dovetailed" into the existing Yellow Freight seniority lists for the purpose of bidding runs out of Yellow's terminal at Baxter Springs.[53] They relied upon the language of Sec. 3(a)(1) of Article 5 of the 1964-67 contract.[54] We do not argue that that is a totally unreasonable judicial reading of the contract.[55] But the issue is whether a contrary reading by the Union leadership (prior to adjudication by the Joint Committee in August of 1967) was so arbitrary as to be a breach of the duty of fair representation. A fair reading of the entire text of the contract as it relates to "seniority" indicates that a reasonable Union leadership could conclude that at best Butler and the other transferring Watson-Wilson drivers were entitled to a seniority credit for fringe benefits only.

Sec. 3(a)(1) of Article 5 simply provides that the seniority lists of the two Companies be "dovetailed so as to create a Master Seniority List based upon total years of service with either Company". That provision does not expressly state that all work opportunities and benefits shall be allocated or determined according to original date of hire with either Company. Moreover, other provisions of the contract do provide for allo-

[53] Appendix A, App. p. A-1; Appendix B, App. p. A-8.

[54] Sec. 3(a)(1) If both carriers involved [in the merger] are solvent, then the seniority lists of the two Companies should be dovetailed so as to create a Master Seniority List based upon total years of service with either Company. This is known as dovetailing in accordance with years of seniority.

[55] We do not contend that broad review of the substantive merits of a Court of Appeals construction of a contract is the proper role of this Court.

cating bid runs on the basis of terminal seniority at the acquiring firm.

As a general rule, the master contract called for determination of seniority rights pursuant to "each of the Supplemental Agreements."[56] As it happens, the Central States Area Over-the-Road contract affirms "terminal seniority, as measured by length of service at such terminal" in the same article which provides that "all runs . . . are subject to seniority."[57]

Referring specifically to mergers of solvent firms, the contract expressly denies a seniority credit for prior work with the acquired firm, when the acquiring firm purchases only operating authority, but not physical assets.[58] Therefore, even though the acquired workers bring work with them, as the Watson-Wilson workers did here, the language of the contract provides that they must line up behind the workers of the acquiring Company when it comes time to bid that work at the terminal of the surviving company.

So, too, if the acquired operating authority is not "parallel" with the operating authority of the acquiring firm, the acquired workers have no contract right to use their prior service credit to to bid on any run in the pool of work which exists after merger. The seniority lists for bidding runs remain separate, each class bidding on its pre-merger increment of work.[59] In this case, the merged operating authorities are not parallel.[60] Yet, But-

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[56] Sec. 1, Article 5 of Appendix D and E, App. pp. A-11, A-18.

[57] Sections 1 and 2 of Article 41, Appendix D and E, App. pp. A-16, A-17, A-24, A-25.

[58] Sec. 3(3) of Article 5 of Appendix D and E, App. pp. A-11, A-19.

[59] Sec. 3(4) and (5) of Article 5 of Appendix D and E, App. pp. A-11, A-12, A-20.

[60] R431-438, 468, 496-497.



ler claims the right to bid on pre-existing Yellow Freight work moving on Yellow's "old" authority.

If workers acquired after merger do not have unqualified contract right (supported by the text of the contract) to use their prior service with the acquired Company to bid on the runs they added to the merged enterprise,[61] they can hardly claim that they reasonably expected to be able to use their prior service to bid on pre-existing runs originating at the terminals of the acquiring Company. No reasonable worker could use the text of the 1964-67, 1967-70 contract to accuse the Local Union of "giving away" firmly secured rights when the local leadership opted for terminal seniority during the Area Committee proceedings.

But did the Change of Operations Committee decision of June 16, 1965 authoritatively construe the contract language for the Union so that its advocacy of terminal seniority for bidding runs was an abandonment of unequivocal rights?

Hardly!

The text of that decision simply calls for a dovetailed master seniority list for "displaced" Watson-Wilson drivers, regardless of their terminal seniority at Watson-Wilson.[62] This list was to determine the order of placement at Yellow Freight, if and when work became available in that enterprise. The document, on its face, is absolutely silent on the material issue: Once the workers got on the Yellow Freight payroll, what additional rights could they claim on the basis of their prior service with Watson-Wilson? Again, the text of the document provides no clues upon which a displaced but transferred Watson-Wilson driver could rely. Accordingly, Local 823 was not closing its eyes to reality when

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[61] Sec. 3(3) of Article 5 of Appendix D and E, App. pp. A-11, A-19.

[62] Appendix C, App. p. A-10.

its leaders urged terminal seniority for bid purposes 26 months later in the adjudication of Butler's claim before the Area Committee.

Nor did the Change of Operation Committee's decision in September of 1966 ("clarifying and elaborating" its decision of June 1965 so as to grant a seniority credit for bidding runs to the 17 Watson-Wilson drivers who successfully bid into Baxter Springs during the first round of bidding)[63] oblige the Local to abandon its advocacy of terminal seniority for bid purposes before the Area Committee in August 1967. By the express terms of the contract, the Area Committee was not bound to apply pre-existing standards to Butler's circumstances. Sec. 3(a)(8) of Article 5 of the 1964-67 Agreement and Sec. 7 of Article 5 of the 1967-70 Agreement gave the Area Committee the power to make "such disposition of seniority problems as in their judgment is appropriate under the circumstances."[64] The Local cannot be deemed to be arbitrarily abandoning "vested" contract rights when it urged terminal seniority for bidding for Butler when the contract allows the adjudication to make an *ad hoc* judgmental disposition of a seniority conflict on the basis that the outcome is "appropriate under the circumstances." The Union simply argued that 24 months after the merger process

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[63] R38-39, 41-46, 58-60, 125-133, 151, 154, 306-316, 326-331, 351-352, 359, 446-448, 469-470, 474-477, 502, 508, 510, 654-655, 691-692, 706, 711-712.

There was a disputed factual issue as to whether in 1966 the Committee decided that although these 17 drivers would be "dovetailed" for bidding runs, all other Watson-Wilson people who thereafter transferred into Baxter Springs would be "dovetailed" for fringes only. In light of the jury verdict, we must assume, as did the District Court, and the Court of Appeals, that the Committee only dealt with the claims of the 17 drivers and did not authoritatively rule on the seniority rights of Watson-Wilson people who might come to work after September 1966.

[64] See Sec. 3(a)(8) of Article 5, Appendix D, App. pp. A-11-14; and Sec. 7 of Article 5, Appendix E, App. p. A-23.



began, it was "appropriate" to respect the desires of a majority of workers at the Baxter Springs terminal.

Given the language and logic of the contract, then, Butler cannot claim that the Union was cavalierly urging the destruction of his reasonable expectations. Therefore, the Union was not acting arbitrarily, especially when advocacy of terminal seniority under the circumstances may well serve the long-run interests of all the workers.

### D. The Union as a Majoritarian Political Institution Can Survive Only if It Is Responsive to the Needs of a Majority of Its Constituency

Neither disposition of Butler's claim has *a priori* validity. The workers' problems begin when the employer decides to shift work from one location to another, after merger. That possibility remains whether transferred workers are "endtailed" or "dovetailed" for the purpose of allocating the available work at a given location. A terminal seniority system allows a worker to sink roots into the community outside the work place secure in the knowledge that as long as work is available, his continuing service will give him relatively more predictable opportunities to earn the material base necessary to support his hometown lifestyle. "Outsiders" cannot alter his relative position. The cost of his choice is a relatively greater loss of income if work is shifted to another location and he must not only pull up stakes, but come in on the bottom of the picking order. "Dovetailing" sacrifices the predictability of his relative position at the hometown location for a less drastic decline in income potential should the driver have to follow the work where the employer has placed it. Why shouldn't the outcome in any given case be determined by the aggregate of individual preference schedules, i.e. majority rule?

A Union leadership which does not respect the wishes of the majority will not be long in power. But more importantly,

the entire concept of trade unionism (individuals acting together to achieve common needs against an adversary with greater per capita resources) is rejected by the notion of a minority veto. If a Union cannot act on the desires of the majority, simply because it is the will of the majority, it ceases to be a union as that concept is understood in our legal system. That result is totally inconsistent with the decisional law of this Court.[65]

## II. This Case Is An Appropriate Vehicle for Clarifying the Dimensions of Union Behavior Which Are So "Arbitrary" as to Constitute a Breach of the Duty of Fair Representation, Regardless of the Motivation Underlying That Behavior.

In most general terms, this Court has held that a Union breaches the duty of fair representation if it disposes of a members claimed breach of the contract in an "arbitrary" fashion *or* in "bad faith"—the latter concept referring to particular kinds of motivation underlying the conduct—racial, sexual, or internal union political bias.[66] (emphasis supplied)

Two quite distinct concepts are suggested. In one case, liability turns solely on proof of subjective motivation: Was the

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[65] *Emporium Capwell Co. v. Community Organization*, 420 US 50, 62-66, 70 (1975); *Labor Board v. Allis-Chalmers*, 388 US 175, 180-181 (1967); *Humphrey v. Moore*, 375 US 335, 346-350 (1964); *Ford Motor Co. v. Huffman*, 345 US 330, 337-339 (1953). Of course, the majoritarian principle is not absolute. Blacks, Chicanos, women, and political dissents cannot be disadvantaged simply because a majority of the Union doesn't want to treat with them. *Emporium Capwell v. Community Organization*, 420 US 50, 64-65 (1975). But subjective bad faith exclusion on racial, sexual, or internal political criteria is not at issue here.

[66] *Emporium Capwell Co. v. Community Organization*, 420 US 50, 64-65 (1975); *Motor Coach Employees v. Lockridge*, 403 US 274, 299, 301 (1971); *Vaca v. Sipes*, 386 US 171, 191-194 (1967).



member treated as s(he) was because the leadership (or the majority) didn't like blacks, women, internal political dissidence, or just the cut of the members jib? The frame of reference is broadly "factual".

On the other hand, to argue that some conduct is "arbitrary" or irrational is often to introduce a normative element into the analysis. The argument becomes a matter of ends or values which the Union "ought to" pursue, regardless of its motivation for doing or not doing so. To say that a person (or institution) is behaving irrationally or arbitrarily is often to say they are pursuing the wrong goals. The question then is, what goals does the labor law system reinforce, and thus, impose on trade unions. That is not a factual inquiry in the usual sense of the terms.

Obviously, outcomes will be determined by the frame of reference which guides analysis. Here, the Union did not act in "bad faith" in the usual subjective sense. No one was out to get Butler because of his race, sex, politics, or lifestyle. But the Court of Appeals thought that the Union leadership was obliged to read the contract as it did and it could not do otherwise simply because of angry pressures from the majority of the membership. In assessing the result, this Court must indicate what affirmative normative obligations a Union must discharge toward its members and the manner in which they must discharge them. That question (which is crucial to all disputes in which the Union has not been acting out of personal prejudice) has not yet been answered.[67] Since the entire duty of fair representation cause of action will be profoundly affected by a determination that the Union does or does not have affirmative obligations of a particular character, prompt answer should

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[67] Lewis, *Fair Representation in Grievance Administration*, 1967 Supreme Court Review, 107-109 (1967).

be forthcoming, particularly since the cause of action is largely a judicial creation.[68]

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[68] *Motor Coach Employees v. Lockridge*, 403 US 274, 286, 289-290 (1971); *Vaca v. Sipes*, 386 US 171, 177-189 (1967). Recently, the Labor Board has held that unions have affirmative obligations beyond avoidance of subjective prejudice, which must be satisfied if they are not to violate the duty of fair representation created by Sec. 8(b)(1)(A) of the Act. However, the Board carefully avoided any coherent elaboration of those obligations. Nonetheless, it claimed that it was simply adopting a doctrine which had been judicially created and elaborated. Given the scope of Board jurisdiction, judicial clarification cannot come too soon. *Rhodes & Jamieson, Ltd.*, 217 NLRB No. 95 (1975).



## CONCLUSION

The concept of the Union as a political mechanism which enables workers to relate to one another and thereby increase their individual strength by acting in aggregate is totally undermined by a ruling that as a matter of law a Union cannot advocate a position before an adjudicative tribunal commissioned to resolve contract disputes which position is determined solely by the strength of majority desires in circumstances where the Union's stance did not constitute an abandonment of minority rights firmly secured by the language and logic of the contract, and would not lead to a diminution of net benefits for the entire membership considered in aggregate. Therefore, the decision of the Court of Appeals is contrary to the fundamental decisional law of this Court. The matter is ripe for review because of the need for clarification of a Union's affirmative obligations to its membership when processing claims of breach of the labor contract, beyond the avoidance of simple bad faith, racial, sexual, or internal political bias.

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